

A/E RISK REVIEW

A PUBLICATION OF THE PROFESSIONAL LIABILITY INSURANCE NETWORK



FINANCE INSURANCE, LTD.
Quality Service For Your Insurance Needs

VOLUME 54, 2005

For More Information Contact:

Karen Hong

Tel: 522-2095

Fax: 522-2082

email: khong@financeinsurance.com

Negotiating Insurance Requirements with Your Clients

The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances. We would like to thank XL Insurance for contributing to this article.

Contracts drafted by your clients often have detailed and many times confusing insurance requirements. Specifications regarding types and limits of coverage, as well as special endorsements, can be mind-boggling. To make sense of and meet these requirements, you'll need a basic understanding of the various types of policies and coverages clients ask for. You'll also need to know what each standard policy insures and what extra coverages can be obtained through amendments – known as “endorsements” -- if needed.

Design professionals must be prepared to tackle impossible or ambiguous insurance requirements in client-written contracts. Often, a client will ask a design firm to provide the types of coverages they routinely get from their contractors. These coverages can be difficult or impossible for you to obtain and may not provide the results your client is looking for. As an A/E/E insurance specialist, we can assist you in educating your clients regarding appropriate insurance coverages for design firms and negotiating reasonable coverages and rates on your behalf.

Design firms also need to consider the types of insurance coverages they should demand from their clients. Again, we can help you identify the types of

insurance coverages you should require of your clients before accepting a new project.

Contractual Insurance Requirements

Take the initiative when dealing with insurance requirements for a new client or project. Offer your client an insurance agreement in simple, straightforward language that says you will attempt to maintain appropriate insurance with reasonable limits of coverage. Then list current coverages on an addendum attached to your contract. For starters, XL Insurance suggests the following language:

INSURANCE

During the term of this Agreement, the Design Professional agrees to provide evidence of insurance coverage as shown on Addendum _____ attached hereto.

The addendum should include a qualifying statement such as: “In accordance with the terms of this Agreement, the Consultant shall attempt to obtain and maintain the following insurance policies with coverages and limits as indicated.” Then list the coverages and limits for the types of insurance required, including the following.

Professional Liability Insurance

Most client insurance requirements begin with professional liability coverage. Professional liability insurance protects designers from claims arising from negligent acts, errors or omissions allegedly committed in the performance of their professional services. Professional liability policies have several unique features that both you and your clients should be aware of:

- Policies are written on a *claims-made* or a *claims-made and reported* policy form. Both of

these policies cover claims made against a design firm during the policy period and require that the claims be reported to the insurance carrier in accordance with policy terms. To be covered, such claims must have arisen from acts, errors or omissions occurring after the *retroactive date* stated in the policy.

- The retroactive date is the date on which you originally obtained your professional liability insurance coverage. To keep its retroactive date in force and have *prior acts* coverage, a design firm normally must maintain continuous coverage. In other words, if you go uninsured for a period of time and then get a new PL policy, you could lose coverage for your acts prior to the new policy's inception date.
- Professional liability policies have annual *aggregate limits*. That means the yearly policy limit purchased is the *total* amount the insurer will pay for all defense costs and indemnity payments regardless of the number of claims made during the policy period.
- Professional liability policies are *expense within the limits* policies (except in the state of Vermont). This means that after you meet your deductible, any additional defense costs paid by your insurer will decrease the policy limits available for payment of that claim or other claims.

Be aware that clients often confuse professional liability insurance with general liability insurance. Thus, they may try to insist that you have the same coverage and stipulations they require of their contractors. For example a client may demand that they be included as an "additional insured" on your professional liability policy. This cannot be done for a number of reasons, including the fact that the client is not a licensed design professional.

Also, clients may insist that you guarantee to maintain a certain level of professional liability coverage for an extended time. Because of the volatility of the insurance market, it is best not to provide such guarantees. Instead consider offering a contractual clause similar to this example provided by XL Insurance:

PROFESSIONAL LIABILITY INSURANCE

The Consultant agrees to attempt to maintain professional liability coverage for the period of design and construction of the Project, and for a period of _____ years following substantial completion, if such coverage is reasonably available at commercially affordable premiums. For the purposes of this Agreement, "reasonably available" and "commercially affordable" shall mean that more than half the consultants practicing the same professional discipline in the state where the project is located are able to obtain such coverage.

Commercial General Liability

Another frequently required type of insurance is commercial general liability (also called comprehensive general liability, CGL, or public liability). This coverage insures your firm against liability claims for bodily injury and property damage arising out of your nonprofessional activities and business operations. For example, this policy provides coverage should a visitor slip and fall while visiting your offices.

Many coverage amendments, or endorsements, that cannot be added to your professional liability policy can be provided under your general liability policy. You might be able to provide your clients with endorsements they believe will give them additional protection under your policies, such as Waiver of Subrogation or being named an Additional Insured.

General liability insurance is sometimes combined with property insurance (covering furniture, fixtures and real property) in what is called an "office package policy." Such packages often include additional coverage for valuable papers and other exposures common to a professional practice. An office package policy often represents an economical form of coverage for smaller firms with standard insurance needs.

Workers Compensation

Workers compensation is a no-fault insurance that protects employers and employees when workers are injured, become ill or are killed on the job as a direct result of their employment. Workers compensation insurance is paid for by the employer and provides benefits for medical costs and lost wages. Although workers compensation insurance is required by statute

in every state, client contracts often require proof that the design firm carries such coverage.

Clients may ask that endorsements they typically require of their contractors be added to your workers compensation policy. Availability of endorsements such as Waiver of Subrogation and Additional Insureds varies from state to state and insurance carrier to carrier. We can help you educate your client regarding such endorsements and negotiate contract language that provides appropriate coverages that are available from your insurer.

Automobile Liability

Clients often require evidence of automobile liability insurance, whether or not you are likely to use vehicles on the project. If you have a business automobile insurance policy, this requirement can be met by providing certificates of insurance. However, if employees drive and insure their personal automobiles, you may face a problem. Private passenger auto insurance companies will not likely issue certificates of insurance or name a client as an additional insured.

Non-Owned Automobile Liability

A client may impose a contract requirement to provide evidence of *non-owned and hired auto coverage*. This is insurance you would carry for automobiles your firm does not own—such as employees' cars used on company business. This type of insurance provides liability coverage for your firm above and beyond the primary limits carried by the car owner. This coverage often is attached to a firm's owned automobile policy or its office package policy. In some states, it may be required to obtain a freestanding Non-Owned Auto Policy.

Foreign Projects Coverage

Many insurance policies provide coverage only in the United States (and perhaps U.S. territories and Canada). If a project is in a foreign country where coverage is not provided under your existing policies, separate foreign coverage insurance may be needed for workers compensation, general liability and/or automobile liability. Professional liability policies often provide or can be endorsed to provide international or worldwide coverage. Check with your agent before undertaking any foreign project.

Owner Insurance Provisions to Contracts

Since clients require verification of insurance coverage maintained by design firms, it's only fair that architects and engineers receive similar verification of the insurance their clients are maintaining, as well as the coverage secured by the contractor.

Following is sample terminology regarding client and contractor insurance coverage you can review with your attorney and possibly adapt in your contract. The article references are to an AIA Owner/Architect agreement (1997 B141), and these clauses should be revised as necessary:

2.9 Owner's Insurance Requirements

2.9.1 -- Owner shall secure and maintain comprehensive general liability insurance providing coverage for bodily injury, property damage, and personal injury for the owner's liability in the amounts of \$_____ per occurrence and in the aggregate. Such coverage will include contractual liability, personal injury liability, and advertising liability. Owner shall include Architect and Architect's Consultants as additional insured under this policy.

2.9.2 -- Owner shall secure and maintain during the course of this project Owners and Contractors Protective Liability Insurance in the amounts of \$_____ per occurrence and in the aggregate. Owner shall include Architect and Architect's Consultants as additional insureds under this policy.

2.9.3 -- Owner shall secure and maintain on behalf of Owner and Owner's Employees Workers Compensation Insurance including Employers Liability coverage. Employers Liability coverage shall be maintained with limits of at least \$_____ per bodily injury, each accident, and \$_____ disease each employee, \$_____ disease policy limit.

2.9.4 -- Owner shall secure and maintain on behalf of Owner, Architect, and Architect's Consultants and as their interest may appear Builders Risk Insurance on this project with limits in accordance with the project value and policy conditions.

2.9.5 -- Owner shall require of the Contractors Comprehensive General Liability Insurance that Owner, Architect, and Architect's Consultants shall all be named as additional insured. Owner shall require the

Contractor to forward certificates of insurance confirming this to all parties.

Conclusion

It is crucial to review and negotiate the insurance terms of any contract entered into with a client. Design firms should not hesitate to specify the coverages they expect the client, contractors and other parties to secure in order to provide proper protection. We can be a valuable business partner when negotiating contracts and obtaining needed coverage.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventatives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.